APPEAL NO. 010079

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 11, 2000. With respect to the single issue before him, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR), rendered by Dr. V on October 4, 1999, is final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The appellant (claimant) appealed asserting that she had good cause for not disputing the certification within 90 days. In its response, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to her left upper arm and shoulder on _____. On October 4, 1999, Dr. V, the claimant's treating doctor, certified that she had reached MMI as of that date with an IR of zero percent. Dr. V's certification was the first such certification of MMI and IR concerning the claimant.

The claimant's testimony, and the exhibits submitted by both parties, established that the claimant was released back to her regular duties on October 4, 1999, and that she returned to work with almost no shoulder pain. In an unappealed finding, the hearing officer found that the claimant received written notice of Dr. V's certification on November 4, 1999. The claimant did not dispute the certification. Three or four months later, the claimant began experiencing pain in her shoulder again and went to her HMO doctor, who ordered an MRI. The MRI showed that the claimant had a rotator cuff tear and bony degeneration problems in the AC joint of her left shoulder. The claimant returned to Dr. V with the MRI results on May 15, 2000. Dr. V determined that the claimant's injury was more severe than he originally thought and that the claimant needed surgery. Dr. V performed surgery on the claimant's shoulder at the end of May 2000. On June 9, 2000, Dr. V rescinded his original certification of MMI and IR.

The claimant now argues that she has good cause to have the first certification of MMI and IR invalidated, despite the fact that she did not dispute it within 90 days of November 4, 1999. The claimant argues that because the misdiagnosis was not discovered within the 90-day time frame established by Rule 130.5(e) to dispute the first certification of MMI and IR, there was no reason to dispute that certification.

We are bound to apply Rule 130.5(e) as it existed on November 4, 1999, the date the claimant received written notification of the first certification of MMI and IR. As such, in accordance with Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d. 248 (Tex. 1999), there were no exceptions to the 90-day rule. The amended version of Rule 130.5(e), which contains a specific exception to finality in the case of a misdiagnosis, does not apply in this

instance because the claimant received notice of Dr. V's certification on November 4, 1999; thus, the 90-day dispute period expired on February 1, 2000, prior to the March 13, 2000, effective date of amended Rule 130.5(e). The hearing officer properly applied Rule 130.5(e), as it existed on November 4, 1999, in reaching his decision that Dr. V's certification of MMI on October 4, 1999, with a zero percent became final under Rule 130.5(e).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge